[Cite as *Falcon Drilling Co., L.L.C. v. Omni Energy Group, L.L.C.*, 2024-Ohio-2558.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

FALCON DRILLING COMPANY, LLC,

Plaintiff-Appellee,

v.

OMNI ENERGY GROUP, LLC et al.

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 23 BE 0046

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 21 CV 149

BEFORE:
Carol Ann Robb, Mark A. Hanni, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed in part, Reversed in Part, and Remanded.

Atty. Michael P. McCormick, Atty. Kyle W. Bickford, Atty. Erik A. Schramm, Jr., Hanlon, McCormick, Schramm, Bickford & Schramm Co., LPA, for Plaintiff-Appellee and

Atty. Christopher J. Gagin, Gagin Legal Services, LLC, for Defendants-Appellants.

Dated: June 28, 2024

Robb, P.J.

{¶1} Appellants, Omni Energy Group, LLC (Omni) and Gerard M. Russomagno (Russomagno), appeal the judgment entering default judgment against them and the subsequent decisions awarding damages for breach of contract and ordering foreclosure. This case arises from a contract to perform services for oil and gas wells between Omni and Plaintiff-Appellee, Falcon Drilling Company, LLC (Falcon), on real property owned by Russomagno.

{¶2} Appellants argue on appeal that the trial court abused its discretion by granting two default judgments against them; they are entitled to relief from those judgments; and if the court did not err by granting default judgments, it erred in calculating damages. For the following reasons, we affirm in part, reverse in part and remand.

Statement of the Case

{¶3} Falcon filed its initial complaint for breach of contract and foreclosure in August of 2021. Falcon is an oil and gas service company. The complaint named seven defendants: Omni Energy Group, LLC, Gerard M. Russomagno, the unknown spouse of Gerard M. Russomagno, the Belmont County Treasurer, Rice Drilling D LLC, EQT Production Company, and Northeast Fluid Supply & Service, LLC. Falcon asserted claims for breach of contract, specific performance, foreclosure of mechanic's lien, and unjust enrichment. (August 5, 2021 Complaint.)

{¶4} On September 3, 2021, Appellants filed a notice of removal of the case to federal court. The notice filed with the trial court alleges Appellants (Omni and Russomagno) received the summons and complaint in August of 2021 and that complete diversity existed. (September 3, 2021 Notice.)

{¶5} The trial court stayed the proceedings pending disposition of the removal pursuant to 28 U.S.C. 1441 and 1446. (September 28, 2021 Judgment.) On April 8, 2022, a February 2022 order from the United States District Court, Southern District of Ohio was filed with the court of common pleas in this case. It states the federal court declined jurisdiction and remanded. Falcon was awarded attorney's fees, costs, and actual expenses associated with the removal request pursuant to 28 USC 1447(c). (February 15, 2022 Order.)

{¶6} After the remand, the trial court issued a judgment granting the parties until May 9, 2022 to move, answer, or otherwise plead to the complaint. The trial court also directed the parties to cooperate to file the Report of Parties and set the case for a status conference on June 6, 2022. (April 26, 2022 Judgment.)

{¶7} On May 6, 2022, the parties filed an agreed entry that granted Falcon leave to file its first amended complaint to add an omitted lien holder. This entry likewise states the parties agreed the defending parties had leave to answer or otherwise respond. It also granted leave to an intervening plaintiff to file its complaint. Appellants' counsel's signature line indicates he agreed to the entry via email. (May 6, 2022, Judgment.)

{¶8} Thereafter, Falcon filed its first amended complaint adding an additional defendant, Javins Corporation, which claimed a security interest in the real property via a mechanic's lien in the amount of $50,800. Falcon attached a copy of the contract between Omni and Falcon as Exhibit 5 to the amended complaint. (May 23, 2023 First Amended Complaint.)

{¶9} The contract is signed by Gerard Russomagno for Omni and Daniel Donahue for Falcon. It states in part that the Operator (Omni) engaged the Contractor (Falcon) "to drill the designated well(s) in search of oil and gas on a Daywork Basis." (May 23, 2023 First Amended Complaint, Exhibit 5.)

{¶10} On May 24, 2023, an invervening plaintiff, Excel Site Rental, LLC, filed its complaint against Appellants, Omni and Russomagno. Excel sought payment for unpaid materials and services performed on an injection well in Belmont County. The intervening complaint alleges Excel was retained and authorized to perform work and was hired to help retrieve broken equipment during the construction of the well. Excel attached an invoice as Exhibit A, which states services were rendered in the amount of $87,920.60. The invoice is addressed to Omni Energy Group and dated May of 2021. (May 24, 2023 Intervening Complaint.) Excel Site Rental, LLC has not filed an appellate brief and has not participated in this appeal.

{¶11} On May 27, 2022, Appellee filed the "Report of Parties" per the court's instruction. The signature page lists Appellants' counsel's name and address, but the line for Appellants' attorney's signature states: "Unsigned and not approved for lack of response." (May 27, 2022 Report.)

{¶12} Defendants EQT Production Company and Rice Drilling D LLC filed their answer to the first amended complaint. (June 6, 2022 Answer.)

{¶13} On June 9, 2022, the trial court held a status conference. The court's judgment states Attorney Gagin participated on behalf of Appellants and he described other pending litigation involving his clients (Appellants) which could impact this case. The trial court set the case for a bench trial and referred the case to mediation. (June 9, 2022 Judgment.)

{¶14} On June 28, 2022, an agreed entry was filed and approved by the court. It states by agreement of counsel, defendant Northeast Fluid & Supply Service, LLC has until July 29, 2022 to move, answer, or otherwise plead. It is also signed by counsel for Northeast Fluid & Supply Service, LLC, who also signed for plaintiff's counsel by permission. (June 28, 2022 Agreed Entry.)

{¶15} On July 7, 2022, Appellee filed a motion for default judgment against Omni, Russomagno, and John and Jane Doe defendants. On July 14, 2022, intervening plaintiff Excel also filed a motion for default judgment against Omni and Gerard Russomagno. The trial court set the motions for a hearing on July 25, 2022.

{¶16} At the hearing on both default judgment motions, counsel for Appellants first noted that Appellants had participated in the proceedings since counsel was involved in a status conference with the court; his clients had paid the attorney's fees ordered by the federal court relative to the removal; and he had updated counsel for Excel about the status of the case. Appellants' counsel stated the failure to answer was "entirely his fault" but claimed his clients had "otherwise defended" by participating in the case. (July 25, 2022 Hearing Tr.)

{¶17} Appellants' counsel then went into great detail to explain his efforts regarding the operation of the well, including a prior lawsuit and "two trips to the Ohio Supreme Court." And thereafter, he stated the Ohio Oil and Gas Commission canceled Omni's order to operate and substituted it with a lower injection pressure rendering its two wells inoperable. Omni filed an administrative appeal from that order. Counsel then stated in addition to handling these oil and gas issues, he was also a full-time county prosecutor. He emphasized the other litigation was essential to get the wells operable, which would allow Appellants to resolve Falcon's and Excel's claims. Without that

revenue, Appellants' attorney claimed they would have to file bankruptcy. Thus, counsel stated "on that basis, * * * I would request a very short timeframe, even up to the end of this week or the end of next week, for Omni and Mr. Russomagno to file the appropriate answers and [third-party complaint against a nonparty]." (July 25, 2022 Hearing Tr. 2-8.)

{¶18} In response, Falcon's counsel and counsel for Excel indicated they had no choice but to move for default judgment because Appellants' counsel had not asked for an extension to file an answer. (July 25, 2022 Hearing Tr. 9.)

{¶19} Counsel for Appellants also indicated their defense included an issue about who was responsible for payment of certain work because a drill bit was lost in the excavation, and there is an issue about who was responsible. He also claimed there was an issue about the contract language. At the conclusion of the hearing, the court asked counsel for Excel whether his client's claim was liquidated. Counsel said it was and in the amount of $87,920.60. The court then asked Falcon's counsel about their claim and counsel agreed it was contested. The court did not ask Appellants' counsel whether they contested either claim. Counsel for Appellants did not interject and did not challenge Excel's counsel's statement that its claim was liquid. (July 25, 2022 Hearing Tr. 10-11.)

{¶20} The trial court subsequently granted both motions for default judgment. The court found Appellants had counsel representing them at the hearing but nothing was filed with the court in response to the motion for default. The court likewise noted counsel for Appellants failed to offer specific reasons as to why they had not responded to the pending motions and why they had not answered the complaint or sought leave to plead. The court also emphasized how Appellants had likewise failed to file an answer to the initial complaint.

{¶21} The trial court entered judgment against Omni and Russomagno. It set a hearing to address Falcon's claim for damages. The court also entered judgment in favor of the intervening plaintiff, Excel, against Omni and Russomagno, joint and several, in the amount of $87,920.60 plus interest and costs. (July 27, 2022 Judgment.)

{¶22} Falcon filed a hearing brief regarding interest sought and a separate brief regarding attorney's fees. (September 6, 2022 Hearing Briefs.) Appellants did not file a brief regarding damages before the hearing.

{¶23} At the September 6, 2022 hearing, Falcon asked the court to issue a nunc pro tunc because the court found Gerard Russomagno jointly and severally liable for contract damages when he was not a party to the contract. Appellants opposed, and the court continued the hearing. (September 6, 2022 Hearing.)

{¶24} The parties briefed the issue and the court issued a new decision. It states in part that it granted the breach of contract claim against Omni. It found Falcon's judgment lien valid, and noted it could foreclose upon it. The trial court also dismissed the unjust enrichment claim and set the case for a damages hearing. Last, the court awarded Excel judgment against Omni and Russomagno, joint and several, in the amount of $87,920.60 plus interest and court costs. (September 29, 2022 Judgment.)

{¶25} The damages hearing was held in October of 2022. Falcon sought damages for breach of contract, attorney's fees under the contract, statutory interest, and costs. (October 17, 2022 Hearing.)

{¶26} Daniel Donahue testified for Falcon. He is the company president and owner. He agreed his company used a form contract and filled in the necessary blanks where applicable. He confirmed that any added language was typed and is in all capital letters. Falcon was contracted to drill two wells under the agreement several hundred feet from one another on the same parcel. Donahue confirmed that mobilization is defined as the process of bringing the company's rig onsite and demobilization means taking the rig off of the jobsite.

{¶27} Page three of Plaintiff's Exhibit 2 is an invoice dated March 30, 2021 for mobilization in the amount of $96,682.85. Donahue testified that the dayrate of $7,000 for mobilization "pays for our crews that are out there mobilizing the equipment * * *. That's why we have a mobilization rate and a demobilization rate. They're separate from the actual trucking and hauling and trains and whatever equipment is utilized to set up the rig on location." Donahue said the dayrate is a separate cost under the contract. According to the April 20, 2021 Falcon invoice number 0055027, Donahue explained it took his company 68.5 hours to mobilize the unit. He agreed that 68.5 times $291.67 ($7,000 divided by 24) equals $19,979.40. (October 17, 2022 Hearing Tr. 34-38, Plaintiff's Exh. 2.)

{¶28} Donahue also confirmed that Falcon started demobilization April 17, 2021, and it was ready to leave the site on April 20, 2021. However, they did not leave the site until April 24, 2021. Falcon charged Omni for Standby time from April 20 through the 24 based on Section 4.6 of the contract. Donahue explained Falcon could not leave the site for those few days because the "operator [Omni] was withholding information in terms of what our orders were going to be." Donahue further said that since Omni was responsible for ordering and paying for Falcon's demobilization trucking, Falcon was waiting to learn who was going to move its equipment. (October 17, 2022 Hearing Tr. 43-47.)

{¶29} When asked what the demobilization trucking costs were and why Falcon did not bill or invoice Omni, Donahue responded:

> "[T]he ownership group of Omni would not help or assist with demobilization of our equipment. So we took it upon ourselves after four days of standby rate * * * to hire a third party trucking company, lease a yard a few miles away, and we incurred 100 percent of those costs, to which we never invoiced Omni, which I should have." He said the standby rate applied because although the rig was torn down, it was onsite and available. (October 17, 2022 Hearing Tr. 48-50.)

{¶30} Gerard Russomagno testified at the hearing. Russomagno testified about problems with the drilling of the first hole. He said certain equipment was lost down the hole and could not be retrieved, so Falcon was "released" on April 17, 2021 after the rig had been down for three days. He said the contract was terminated. (October 17, 2022 Hearing Tr. 99-104.)

{¶31} The parties briefed their damages arguments after the hearing. They agreed their contractual relationship is governed by Pennsylvania law per their agreement.

{¶32} Appellants argued the cost of mobilization trucking and equipment was included in the "Daywork rate" under Section 4.1 of the agreement. They contend the $7,000 Daywork rate includes Falcon's initial mobilization. Despite this, Appellants claim Falcon erroneously included costs in its invoice to "move rig 24 from Indiana to Omni Pad;" Haul manlift to location;" and "Cost to haul and set up man camps on location" when these costs were encompassed by the Daywork rate in Section 4.1. Thus, Appellants

argued the initial mobilization permissible cost under the contract was $19,979.40, not the billed amount of $96,682.85.

{¶33} Appellants also challenged Falcon's billing of "Standby Time" under Sections 6.3, 6.4, and 4.6 of the parties' contract.

{¶34} Appellants assert they terminated the contract on April 17, 2021, the date Falcon began dismantling its rig. Thus, Appellants claim in their brief that under Section 6.4, the early termination section of the agreement applied and it stated "N/A." Thus, Appellants claim Falcon was not entitled to payment of the Daywork rate after April 17, 2021. However, they claimed Falcon was still entitled to be paid for demobilization under Section 4.2.

{¶35} Appellants also claimed the "Standby Time" rate only applied when the rig was shut down but "in readiness to begin or resume operations * * *." Appellants assert that because the rig was dismantled as of April 20, 2021, it should not be charged the Standby Time rate thereafter. (November 7, 2022 Post-hearing Damages Brief.)

{¶36} Falcon replied and urged the court to find they were entitled to the Daywork rate plus the cost of trucking, permits, and equipment.

{¶37} In November of 2022, the court entered judgment in favor of Falcon for breach of contract in the amount of $463,551.52 and for attorney's fees in the amount of $41,821.96 for a total award of $505,373.48, plus interest and court costs. The court found the parties' agreement was not ambiguous and that the contract stated Omni was to pay Falcon the mobilization day rate in addition to the cost of trucking, permit costs, and the cost of equipment. The trial court likewise found the challenged $30,187.85 set forth in invoice 055030 was properly billed to Omni "under either paragraph 4.2, 4.3, 4.6 and/or paragraph 6.15 of Exhibit A of the contract." The court also indicated the case will proceed to foreclosure "upon plaintiff's request." (November 29, 2022 Judgment.)

{¶38} The Belmont County Clerk of Courts later issued a certificate of judgment lien in Falcon's favor in the amount of $543,312.80, consisting of contractual damages, interest, and attorney's fees. (November 30, 2022 Certificate of Judgment.)

{¶39} Appellants filed their first appeal, which we found lacked a final appealable order.

{¶40} Falcon subsequently filed a notice of presentation and proposed decree for foreclosure and sale. (December 7, 2022 Notice.) The decree of foreclosure was issued December 20, 2022.

{¶41} The order of sale was issued March 30, 2023. It was corrected via the court's April 13, 2023 corrected order of sale.

{¶42} Appellants moved the court for an entry of final judgment and a stay of the foreclosure pending appeal. (April 18, 2023 Motion.) Falcon opposed the motion. A motion hearing was held on May 4, 2023.

{¶43} Thereafter, the court found the decree of foreclosure should have been a final appealable order. The court instructed Appellants' counsel to prepare and submit an amended judgment. (May 5, 2023 Judgment.) It was filed May 18, 2023.

{¶44} Appellants filed their notice of appeal from the trial court's decisions issued July 27, 2022, November 29, 2022, May 18, 2023, and October 5, 2023. They raise two assignments of error.

Default Judgment

{¶45} Appellants' first assigned error asserts:

"The trial court erred in granting the default judgments as both Defendant-Appellants otherwise defended against these actions and established excusable neglect."

{¶46} Appellants want the default judgments to be vacated and the case to be reinstated with a new trial court judge. Appellants' first assigned error consists of four subparts.

Leave to Answer

{¶47} Their first argument contends the court abused its discretion by failing to grant their oral request for an extension of time because they demonstrated excusable neglect consistent with Civ.R. 6(B). Appellants claim their attorney's neglect was excusable since he simultaneously had to appeal an Oil and Gas Commission decision and maintain his felony criminal docket at the prosecutor's office. Appellants state their attorney was candid about his neglect to opposing counsel and the trial court.

{¶48} Civ.R. 6(B) states in part:

> Time: Extension. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a

> specified time, the court for cause shown may at any time in its discretion * * * upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect * * *.

{¶49} A Civ.R. 6(B) excusable neglect decision is within the trial court's discretion, and consequently, a reviewing court cannot substitute its judgment for the trial court's decision. We review these decisions for an abuse of discretion and must not disturb the trial court's decision unless the court's attitude is unreasonable, arbitrary, or unconscionable. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 465, 650 N.E.2d 1343 (1995).

{¶50} "[T]he determination of whether neglect was excusable or inexcusable "must * * * take into consideration all the surrounding facts and circumstances." * * * Courts must also remain mindful of the admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds." *Marion Prod. Credit Ass'n v. Cochran*, 40 Ohio St.3d 265, 271, 533 N.E.2d 325 (1988).

{¶51} While it is preferable to hear a case on its merits, the rules of procedure must be applied consistently, and a party's noncompliance should not be overlooked. *Davis v. Immediate Med. Services, Inc.*, 80 Ohio St.3d 10, 15, 684 N.E.2d 292 (1997). Considerations include whether the opposing party has been prejudiced as a result of the delay and if the party claiming excusable neglect shows it has otherwise diligently participated in the proceedings and abided by the court's authority. *See Marion Prod. Credit Ass'n v. Cochran*, *supra*, at 272.

{¶52} In *Marion*, the Supreme Court concluded there was no significant prejudice from the delay because the party opponent was not misled into believing the defaulting party was not going to oppose the claim and also the opposing party was not prevented from pursuing discovery. *Id*. at 271-272.

{¶53} The *Marion* Court noted the significant length of the delayed filing in that case—four years—but found this fact alone did not preclude a finding of excusable neglect because "considerable litigation occurred in the case during that period." *Id*. at 272. *Marion* also emphasized that the counterclaim (which was not timely answered) had initially been severed for trial, meaning the trial would address the severed claim after the

foreclosure proceedings. As a result, counsel focused on the foreclosure action. *Id*. at 271.

{¶54} Another consideration is whether the request for leave to answer is filed in response to a motion for default judgment. A request for leave should be more freely granted when a motion for default judgment has not been filed. *State ex rel. Weiss v. Indus. Comm.*, 65 Ohio St.3d 470, 473, 605 N.E.2d 37 (1992).

> [Whether neglect is excusable] is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include * * * the danger of prejudice to the [other party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

(Citations omitted.) *Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 395, 113 S.Ct. 1489 (1993) (applying bankruptcy rules permitting a late filing if the untimeliness was the result of excusable neglect).

{¶55} In support of their claimed excusable neglect, Appellants assert they participated in the trial court proceedings by seeking to remove the case to federal court; stipulating to the agreed judgment entry allowing Excel to enter as a party to the litigation; and participating in the June 9, 2022 status conference.

{¶56} Additionally, Appellants claim the parallel litigation had to take precedence since the ODNR decision determined the operability of Appellants' wells and their ability to pay any claims in this case. Last, Appellants rely on their attorney's recent acceptance of a full-time job at the local prosecutor's office as supporting excusable neglect.

{¶57} Falcon, on the other hand, contends Appellants waived any excusable neglect argument based on their failure to raise this issue to the trial court.

{¶58} While we agree that Appellants did not explicitly invoke Civ.R. 6(B) or refer to the term "excusable neglect" at the default judgment hearing, the contention was nonetheless apparent based on the assertions and arguments made by Appellants' counsel. Thus, we disagree the argument was waived.

{¶59} Although Appellants attempted to remove the case to federal court, on remand, the trial court provided the parties with notice and a reminder that answers were outstanding. Thereafter, Appellants failed to answer not just one complaint, but two.

{¶60} Further, Appellants did not file written responses to the two separate motions for default judgment. Instead, Appellants waited and orally requested additional time to file their answer at the hearing. On the date of the hearing, Appellants' counsel could have filed a written leave with the clerk of courts and a copy of their proposed answers for filing.

{¶61} Moreover, Appellants evidently did not participate in the May 2022 Report of Parties, despite the court's directive to do so. Falcon's counsel indicates in the report that Appellants did not consent to or participate in the preparation of the report.

{¶62} Based on this record, the court was well within its discretion to deny Appellants leave to file their answers. Their counsel appeared at the hearing and sought an extension of time, but only after the default motion was filed.

{¶63} Further, it is reasonable to conclude the trial court found Appellants' failure to file the requisite answers was within the reasonable control of the movant. Although Appellants' counsel explained how busy he was in his other job and litigating parallel litigation involving Appellants' ability to operate their wells, counsel did not identify a specific issue causing their failure to file the requisite answers. The trial court found Appellants' failures, resulting from their attorney's overextending himself, were not excusable. The trial court also found the disregard for and noncompliance with the Civil Rules significant here since Appellants failed to file two answers.

{¶64} Although the trial court could have found excusable neglect on this record, we cannot substitute our judgment for that of the trial court. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). "[R]esults can often vary in different cases, as there can be more than one reasonable decision from which the trial court could choose." *Sokolowski v. Sokolowski*, 2017-Ohio-9216, 101 N.E.3d 1105, ¶ 41, (7th Dist.) quoting *Yancey v. Yancey*, 7th Dist. Mahoning No. 07 MA 33, 2007-Ohio-5045, ¶ 25. Accordingly, this argument lacks merit.

Otherwise Defend

{¶65} Appellants' next sub-argument contends the trial court abused its discretion granting the two default judgments. Appellants claim default judgment was erroneous since they "otherwise defended" the actions against them by participating in the proceedings. They also seem to contend this court should grant them Civ.R. 60(B) relief or that the trial court should have granted them Civ.R. 60(B) relief.

{¶66} First, to the extent Appellants claim they "otherwise defended" the claims here such that default judgment was not appropriate, we disagree.

{¶67} Civ.R. 55(A) states in part, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor * * *."

{¶68} The phrase "otherwise defend" is not defined in the rule, but it generally refers to other motions permitted "by the Civil Rules to be made prior to or in lieu of an answer." *Reese v. Proppe*, 3 Ohio App.3d 103, 443 N.E.2d 992 (8th Dist.1981).

{¶69} As noted, Appellants' counsel participated in a status conference. Appellants also sought to remove the case to federal court, which remanded the matter to the trial court. Thereafter, the trial court alerted the parties of the outstanding responsive pleadings. Appellants did not file an answer to Falcon's original complaint on remand.

{¶70} Falcon then filed its first amended complaint and the intervening plaintiff Excel subsequently filed its complaint. Appellants did not file answers or otherwise dispute the allegations via any other responsive motions or pleadings.

{¶71} Falcon and Excel moved for default judgment, and the trial court set the matter for a hearing more than 10 days later with notice to Appellants.

{¶72} Because Appellants took no action after the amended complaint and intervening complaints were filed, and likewise took no action after the federal court's remand, they did not "otherwise defend" Falcon's first amended complaint or Excel's intervening complaint. "A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading." *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Ass'n*, 28 Ohio St.3d 118, 121, 502 N.E.2d

599 (1986) (discussing availability of default judgment when a party fails to appear for trial).

{¶73} Because Appellants failed to file any pleading, let alone timely pleadings, in response to the amended complaint and intervening complaint, the trial court did not abuse its discretion by entering default judgment against them.

{¶74} We also find that Appellants' counsel's participation in the status conference and filing notice of removal before these affirmative pleadings were filed against them do not show Appellants "otherwise defended" these affirmative claims against them. *See Black v. Oakes*, 10th Dist. Franklin No. 00AP-1133, 2001 WL 710105, *6 ("we do not find that the language 'otherwise defend' contemplates either participating in the discovery process or appearing at a preliminary injunction hearing.") Moreover, the fact that Civ.R. 55(A) explicitly permits default judgment when a party has appeared in the action with seven days' notice of a hearing supports this conclusion.

{¶75} Accordingly, this argument lacks merit.

Civ.R. 60(B)

{¶76} As Appellants allege, Civ.R. 55(B) authorizes a trial court to set aside a default judgment via Civ.R. 60(B). However, Appellants fail to reference any legal authority showing a trial court can sua sponte vacate a judgment under Civ.R. 60(B).

{¶77} Instead, Civ.R. 60(B) states: "*On motion* and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons * * *." (Emphasis added.) Thus, a party must file a motion for relief from judgment or orally move the court for relief.

{¶78} Here, no written or oral motion for relief from judgment was sought in the trial court proceedings. Thus, the trial court did not err in failing to grant an argument not raised and a motion not made.

{¶79} To the extent Appellants claim we can grant them Civ.R. 60(B) relief at this juncture, we disagree.

{¶80} Appellants argue the merits of a motion for relief from judgment for the first time in their appellate brief. Because parties cannot raise new arguments for the first time on appeal, we decline to address Appellants' Civ.R. 60(B) arguments. *State v. Fleischer*, 2023-Ohio-3597, 225 N.E.3d (7th Dist.) 1261--, ¶ 17 (parties cannot change the theory of

their case on appeal); *Morrison v. Liberty Mut. Ins. Co.*, 12th Dist. Butler No. CA2021-12-163, 2022-Ohio-2458, ¶ 21 (Civ.R. 60(B) motion for relief from judgment must first be made to the trial court).

Excel's Damages

{¶81} Appellants' final sub-argument under this assigned error contends the trial court was required to hold a hearing before awarding damages in Excel's favor.

{¶82} Appellants contend Excel asserted a breach of contract claim and only attached a copy of an invoice to its intervening complaint. Excel's May 24, 2022 Intervening Complaint contends Excel was retained by Omni to assist with the retrieval of broken equipment. Excel claims it performed the duties for which it was hired and submitted an invoice to Omni, but that Omni has not paid the amount due. Excel attached an invoice dated May 14, 2021 in the amount of $87,920.60 for work performed in April and May of 2021. (May 24, 2022 Intervening Complaint Exhibit 1.)

{¶83} As stated, Falcon and Excel moved for default judgments against Appellants. Both motions were heard at the same hearing. At the conclusion of the hearing, the court asked counsel for Excel whether his client's claim was liquidated. Counsel said it was, and it was in the amount of $87,920.60. Counsel for Appellants was present at the hearing. However, the court did not ask Appellants' counsel on the record whether they contested the liquidity of Excel's claim. Notwithstanding, Appellants' counsel did not interject or otherwise dispute Excel's statement that its claim was liquid at the hearing. (July 25, 2022 Hearing Tr. 10-11.)

{¶84} Appellants likewise did not file a motion thereafter challenging this conclusion with the trial court. On August 18, 2022, Excel requested a certificate of judgment, which was issued in Excel's favor in the amount of $87,920.60 and filed with the court. (August 18, 2022 Certificate of Judgment.) Further, the amount of Excel's damages was not raised or challenged during the October 2022 hearing held regarding Falcon's claimed damages.

{¶85} Trial courts typically hold a hearing on damages after granting a default judgment. *Farmer v. PNC Bank, N.A.*, , 2017-Ohio-4203, 92 N.E.3d 218, ¶ 46. (2nd Dist.) However, Civ.R. 55(A) provides the decision to hold a hearing on damages is discretionary when it is not necessary to determine the amount of damages. *Nationwide*

Mut. Fire Ins. Co. v. Barrett, 7th Dist. Mahoning No. 08 MA 130, 2008-Ohio-6588, ¶ 26. "'[W]hen the complaint and the motion for default judgment clearly set forth the amount of damages and shows that it is ascertainable, the trial court does not abuse its discretion in relying on the amount asserted therein.'" *Id*. citing *Palisades Collections, L.L.C. v. Grieshop,* 3d Dist. No. 2-07-13, 2007-Ohio-5766, ¶ 16-18; *accord W2 Properties, L.L.C. v. Haboush*, 196 Ohio App.3d 194, 2011-Ohio-4231, 962 N.E.2d 858, ¶ 29 (1st Dist.); *Hull v. Clem D's Auto Sales*, 2d Dist. Darke No. 2011-CA-6, 2012-Ohio-629, ¶ 7.

{¶86} Here, the amount of damages claimed was ascertainable from the complaint and attached invoice. Further, Appellants did not object to Excel's contention that the claim was liquid or otherwise challenge the amount requested. Based on this record, we find no abuse of discretion.

{¶87} Moreover, because Appellants did not raise this issue to the trial court, it was waived. Appellate courts generally will not address the merits of an argument that could have been raised to the trial court. *Mauldin v. Youngstown Water, Dept.*, 2019-Ohio-5065, 150 N.E.3d 433, ¶ 11 (7th Dist.).

{¶88} Accordingly, Appellants' first assignment of error lacks merit in its entirety and is overruled.

Falcon's Damage Award

{¶89} Appellants' second assignment of error asserts:

"In the alternative, if default judgment were properly granted, the trial court erred in the calculation of Falcon and Excel's contract damages."[1]

{¶90} Appellants assert the trial court erred in its calculation of damages. Appellants challenge $126,870.70 of the damages awarded to Falcon. They contend Falcon was only entitled to damages totaling $378,502.78 ($505,373.48 minus $126,870.70).

{¶91} According to Appellants, Falcon sought and was awarded $505,373.48. This amount is comprised of $463,551.52 in contract damages ($498,551.52 minus Omni's $35,000 payment in April of 2021) in addition to $30,344.35 in attorney's fees, consisting of $41,821.96 in attorney's fees minus the $11,477.61 Omni already paid in

[1] This assignment of error only addresses damages awarded to Falcon. Appellants' arguments regarding Excel's damage award are set forth in Appellants' first assigned error.

connection with Appellants' attempt to remove the case to federal court. Thus, Appellants seek a reduction in the amount of damages awarded to Falcon.

{¶92} This assignment of error presents two arguments, which align with Appellants' arguments in their post-hearing damages brief filed with the trial court. Both arguments require analysis of the contract. Appellants do not take issue with the attorney fee award, and thus, we limit our review accordingly.

The Contract

{¶93} The contract is between Omni and Falcon. Omni hired Falcon to drill two wells for Omni on the same parcel owned by Russomagno. The contract is signed by Gerard Russomagno for Omni and Daniel Donahue for Falcon. (May 23, 2023 First Amended Complaint, Exhibit 5.)

{¶94} The parties used a form contract from the International Association of Drilling Contractors. The contract designates Omni as the "Operator" and Falcon as the "Contractor." The contract is titled "DRILLING BID PROPOSAL AND DAYWORK DRILLING CONTRACT – U.S." (Capitalization sic). The contract expressly incorporates as part of the agreement the "specifications and special provisions set forth in Exhibit 'A' and Exhibit 'B'."

{¶95} The contract states the Operator (Omni) engaged the Contractor (Falcon) "to drill the designated well(s) in search of oil and gas on a Daywork Basis." Immediately after this statement, the second prefatory paragraph defines the term "Daywork" or "Daywork Basis" and states:

> For purposes hereof, the term "Daywork" or "Daywork Basis" means Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction, supervision and control of Operator * * *. *When working on a Daywork Basis, Contractor shall be fully paid at the applicable rates of payment and assumes only the obligations and liabilities stated herein. Except for such obligations and liabilities specifically assumed by Contractor, Operator shall be solely responsible and assumes liability for all consequences of operations by both parties while on a Daywork Basis, including results and all other risks or liabilities incurred in or incident to such operations*.

(Italics sic.)

{¶96} The parties' contract also provides:

4. DAYWORK RATES:

Contractor shall be paid at the following rates for the work performed hereunder.

4.1 Mobilization: Operator shall pay contractor a mobilization fee of $_____ or a mobilization day rate of $7,000 per day. This sum shall be due and payable in full at the time the rig is rigged up or positioned at the well site ready to spud. Mobilization shall include: MOBILIZATION RATE & THE COST OF TRUCKING, PERMITS, AND EQUIPMENT NEEDED TO MOB THE RIG TO LOCATION.

4.2 Demobilization: Operator shall pay Contractor a demobilization fee of $_____ or a demobilization day rate during tear down of $7,000 per day, provided however that no demobilization fee shall be payable if the Contract is terminated due to the total loss or destruction of the rig. Demobilization shall include: DEMOBILIZATION RATE & THE COST OF TRUCKING, PERMITS AND EQUIPMENT NEEDED TO DEMOB TO FALCON DRILLINGS YARD IN INDIANA, PA.

4.3 Moving Rate: During the time the rig is in transit to or from a drill site, or between drill sites, commencing on 3/18/21, Operator shall pay Contractor a sum of $7,000 per twenty-four (24) hour day. PLUS THE COST OF TRUCKING.

* * *

4.6 Standby Time Rate: $7,000 per twenty-four (24) day. Standby time shall be defined to include time *when the rig is shut down although in readiness to begin or resume operations* but Contractor is waiting on orders of Operator or on materials, services or other items to be furnished by Operator.

* * *

6.3 Early Termination:

(a) By Either Party: Upon giving of written notice, either party may terminate this Contract when total loss or destruction of the rig, or a major breakdown with indefinite repair time necessitates stopping operations hereunder.

(b) By Operator: Notwithstanding the provisions of Paragraph 3 with respect to the depth to be drilled, Operator shall have the right to direct the stoppage of the work to be performed by Contractor hereunder at any time prior to reaching the specified depth, and even though Contractor has made no default hereunder. In such event, Operator shall reimburse Contractor as set forth in Subparagraph 6.4 hereof.

* * *

6.4 Early Termination Compensation:

6.5 (a) Prior to Commencement: * * *

(b) Prior to Spudding: If such termination occurs after commencement of operations but prior to the spudding of the initial well, Operator shall pay Contractor as liquidated damages and not as a penalty a sum equal to the standby time rate (Subparagraph 4.6) for a lump sum of, THE COST INCURRED BY FALCON DRILLING TO CONDUCT THIS PROJECT FOR EXAMPLE: LABOR AND EQUIPMENT UPGRADES, NO ADDITIONAL RATE WILL BE ADDED TO THIS COST.

(c) Subsequent to spudding: N/A

(Capitalization sic.) (Italics added.)

{¶97} Exhibit A to the Daywork Contract consists of four pages. Page three of Exhibit A lists 58 items and designates which party to the contract is responsible for each item. It states:

6. EQUIPMENT, MATERIALS AND SERVICES TO BE FURNISHED BY DESIGNATED PARTY: The machinery, equipment, tools, materials, supplies, instruments, services and labor listed as the following numbered items, *including any transportation required for such items unless otherwise specified, shall be provided at the well location and at the expense of the party hereto as designated by an X mark in the appropriate column*.

(Emphasis added.)

{¶98} There are 58 listed items below one of two columns labeled "Operator" or "Contractor" and numbered from 6.1 to 6.58 under the heading "To Be Provided By and At The Expense Of."

{¶99} Number "6.15 Transportation of Contractor's Property:" has blanks next to the words "Move in" and "Move out." Both Move in and Move out have an "X" in the Operator column, indicating this service was to be provided by and at the expense of Omni.

Mobilization Costs

{¶100} First, Appellants challenge Falcon's right to certain mobilization costs under Section 4.1 of the parties' contract. They claim Falcon overbilled them by $96,682.85 for its initial equipment mobilization. In support, Appellants directed the trial court to the Falcon invoice and its reference to Section 4.1 of the contract. Appellants claim Falcon double billed them in light of its attempt to collect the "Daywork Rate" in addition to the cost of trucking, permits, and equipment.

{¶101} Appellants claim the contract is unambiguous and that it does not allow Falcon to charge the day rate plus the cost of trucking, permits, and equipment. Instead, they claim the day rate includes the cost of trucking, permits, and equipment. They assert the final sentence of Section 4.1 is intended to define what mobilization includes; it does not set forth these items for billing purposes.

{¶102} In support, Appellants direct our attention to Section "4.3 Moving Rate" which sets forth the same day rate and then includes the words "PLUS THE COST OF TRUCKING." They claim this section shows the day rate for this function was in addition to the cost of trucking. Whereas, Section 4.1 does not state "plus the cost of trucking." It states "mobilization shall include: mobilization rate & the cost of trucking, permits, and equipment needed to mob the rig to location" such that this sentence explains what the act of mobilization encompasses.

{¶103} In response, Falcon contends that Section 4. "Mobilization" unambiguously authorized Falcon to charge Appellants the $7,000 day rate in addition to the costs of trucking, permits, and equipment needed based on the final sentence in

Section 4.1. Alternatively, Falcon claims Omni's duty to pay for the cost of trucking, permits, and equipment is set forth in paragraph 6.15 of Exhibit A to the parties' contract.

{¶104} As stated, the trial court found the parties' agreement was not ambiguous. It concluded under Section 4.1 Mobilization, the contract obligated Omni to pay Falcon the mobilization day rate plus the cost of trucking, permit costs, and the cost of equipment. The trial court likewise found the challenged $30,187.85 set forth in invoice 055030 was properly billed to Omni "under either paragraph 4.2, 4.3, 4.6 and/or paragraph 6.15 of Exhibit A of the contract." (November 29, 2022 Judgment.) Appellants challenge both of these conclusions.

{¶105} Pursuant to the parties' contract, this issue is governed by Pennsylvania law

> "The interpretation of a contract is a question of law. In deciding an issue of law, an appellate court need not defer to the conclusions of the trial court." * * * When the language of a contract is unambiguous, we must interpret its meaning solely from the contents within its four corners, * * * consistent with its plainly expressed intent. * * * We may not consider extrinsic evidence unless the terms are ambiguous. * * * A contract is not ambiguous merely because the parties do not agree on its construction.

Seven Springs Farm, Inc. v. Croker, 2000 PA Super 72, 748 A.2d 740, ¶ 7 (Pa. Super. Ct.), *aff'd,* 569 Pa. 202, 801 A.2d 1212.

{¶106} Thus, we review the parties' contract de novo. *Genaeya Corp. v. Harco Nat. Ins. Co.*, 2010 PA Super 33, 991 A.2d 342, ¶ 14.

> If the contractual terms are clear and unambiguous on their face, then such terms are deemed to be the best reflection of the intent of the parties. *Kripp v. Kripp,* 578 Pa. 82, 849 A.2d 1159, 1162 (2004). If, however, the contractual terms are ambiguous, then resorting to extrinsic evidence to ascertain their meaning is proper. *Murphy v. Duquesne Univ. Of The Holy Ghost,* 565 Pa. 571, 777 A.2d 418, 429 (2001). A contract's terms are considered ambiguous " 'if they are subject to more than one reasonable interpretation when applied to a particular set of facts.' " *Id.* at 430.

Com. ex rel. Kane v. UPMC, 634 Pa. 97, 134, 129 A.3d 441.

{¶107} Ambiguous writings are interpreted by the finder of fact. *Kripp v. Kripp*, 578 Pa. 82, 90-91, 849 A.2d 1159 (2004), citing *Community College v. Society of the Faculty,* 473 Pa. 576, 375 A.2d 1267, 1275 (1977). When a contract is ambiguous, courts may construe the writing against the drafter and consider extrinsic evidence in an effort to clarify or resolve the ambiguity. *In re Estate of Blumenthal,* 812 A.2d 1279, 1286 (Pa.Super.2002).

{¶108} As stated, the trial court found the parties' agreement was not ambiguous. We agree.

{¶109} The definition of Daywork included in the form contract explicitly defines Daywork as the Contractor furnishing "equipment, labor, and perform[ing] services * * * for a specified sum per day * * *." The first two sentences of Section 4.1 deal with cost, set forth a day rate, and state "this sum" is due at a certain time.

{¶110} The third sentence of Section 4.1 Mobilization states: "Mobilization shall include: MOBILIZATION RATE & THE COST OF TRUCKING, PERMITS AND EQUIPMENT NEED TO MOB THE RIG TO LOCATION." The inclusion of the words "rate" and "cost" in the last sentence of 4.1 shows Falcon was authorized to charge the Daywork rate and these other costs.

{¶111} Accordingly, this aspect of the agreement is not ambiguous. It authorized Falcon to receive the day rate in addition to the costs and expenses for trucking, permits, and equipment. Thus, reference to and reliance on Section 6.15 of Exhibit A is not necessary.

{¶112} Based on the foregoing, we affirm this aspect of the trial court's decision.

Standby Time

{¶113} Appellants' second argument contends Falcon improperly billed Omni in the amount of $30,187.85 for "Standby Time" under Section 4.6. They claim Falcon's rig was not "in readiness to begin or resume operations" from April 20, 2021 to April 24, 2021. Instead they contend it was disassembled and ready for relocation, not ready to resume operations.

{¶114} Because Falcon's rig was not "shut down although in readiness to begin or resume operations," Appellants claim they were wrongfully charged for Standby Time, and the damages award should be reduced by $30,187.85. We agree.

{¶115} As alleged, Donahue testified that Falcon started demobilization April 17, 2021, and the rig was ready to leave the site on April 20, 2021. However, it did not leave the site until April 24, 2021. Thus, per Donahue, Falcon charged Omni for Standby Time from April 20 through the 24 based on Section 4.6 of the contract.

{¶116} Appellants urge us to find that upon Omni's early termination of the contract on April 17, 2021, Falcon was not entitled to additional compensation pursuant to Section 6.4. They assert because this section governing early termination indicated "N/A," Falcon was precluded from recovering compensation after the contract was terminated, except for demobilization under Section 4.2.

{¶117} Falcon disagrees and claims it properly billed Appellants for Standby Time from 12 a.m. on April 20, 2021, through 7:30 a.m. on April 24, 2021 since Falcon was at the jobsite waiting on orders from Omni. Donahue testified that even though the rig was torn down, it was onsite and available. (Damages Hearing Tr. 46.) Neither party disputes Falcon was "waiting on the orders" or services to be provided by Omni. Donahue testified Falcon's rig was disassembled and waiting on Omni to provide its orders or the trucking and associated services needed to move its rig. (October 17, 2022 Hearing Tr. 43-47.)

{¶118} The trial court held that the challenged $30,187.85 set forth in invoice 055030 dated April 21, 2021 was properly billed to Omni "under either paragraph 4.2, 4.3, 4.6 and/or paragraph 6.15 of Exhibit A of the contract." (November 29, 2022 Judgment.) The trial court did not explicitly address Appellants' argument about early termination.

{¶119} Donahue testified in part:

> [T]he ownership group of Omni would not help or assist with demobilization of our equipment. So we took it upon ourselves after four days of standby rates and threats from the ownership group that if we don't do something, that he would move that equipment off to the side of the location. So we took it upon ourselves to hire a third party trucking company, lease a yard a few miles away, and we incurred 100 percent of those costs, to which we've never invoiced to Omni, which I should have.

(October 17, 2022 Hearing Tr. 49.)

{¶120} He also said even though the rig had been torn down and was ready to move off site, it was onsite and available had Omni given the order to resume operations. (October 17, 2022 Hearing Tr. 50.)

{¶121} First, we agree that Section 6.4(a) does not afford Falcon "Early Termination Compensation." As alleged, this section states "N/A" after spudding commences, and it is undisputed that spudding occurred here.

{¶122} However, Section 6.4(a) does not eliminate or preclude Falcon's contractual right to payment under other applicable sections of the agreement. Section 6.4(a) merely provides there is no agreed upon compensation for early termination once spudding occurs. This section has no impact on the right to recover for Standby Time, which is governed by another section.

{¶123} As stated, Section 4.6 sets forth a Standby Time Rate of $7,000 a day. Standby Time is a defined term in the contract. It states: "Standby time shall be defined to include time *when the rig is shut down although in readiness to begin or resume operations* but Contractor is waiting on orders of Operator or on materials, services or other items to be furnished by Operator." (Emphasis added.)

{¶124} Omni urges us to find that the definition of Standby time does not apply to the facts. A plain reading of the contract definition of Standby time shows it covers when the rig is shut down but "in readiness to begin or resume operations."

{¶125} Donahue confirmed his company started demobilization April 17, 2021, and it was ready to leave the site on April 20, 2021. Thus, it is logical to infer that it takes three days to disassemble the rig.

{¶126} "Readiness" is defined as "the quality or state of being ready." https://www.meriam-webster.com/dictionary/readiness (accessed March 5, 2024).

{¶127} Here, the rig was not in a state of readiness to resume operations. In light of this fact, we cannot conclude that the charging of Standby Time was appropriate. Under our de novo standard of review, we conclude that this contractual provision is not ambiguous. To the extent the court allowed Falcon to charge for Standby Time when the rig was disassembled, we find error. We reverse and vacate the damages award corresponding with Falcon's charges for Standby Time.

{¶128} Finally, we also note that Appellants raise the issue of unconscionability for the first time in their reply brief. Appellants claim Falcon's reading of the contract entitling them to an "enormous profit" is unconscionable and violates the Pennsylvania statute governing unconscionability.

{¶129} Appellants did not raise this issue to the trial court and did not assert it in their merit brief. Accordingly, the argument was waived and cannot be raised for the first time in their reply brief. *G.A.I. Capital Group LLC v. Lisowski*, 2023-Ohio-4802, 223 N.E.3d 22 ¶ 94 (7th Dist.) (issue not raised during trial is waived on appeal); *Shutway v. Chesapeake Expl., LLC*, 2019-Ohio-1233, 134 N.E.3d 721, ¶ 77 (7th Dist.) ("a reply brief is not the proper place for raising original, substantive arguments").

{¶130} In conclusion, Appellant's second assignment of error has merit in part.

Conclusion

{¶131} Based on the foregoing, Appellants' first assigned error lacks merit and is overruled. The trial court's decisions entering default judgment are affirmed.

{¶132} Appellants' second assigned error has merit in part. We reverse and vacate the damages award in part. On remand, the trial court shall issue a new judgment regarding damages and reduce the award in Falcon's favor. The court shall not include an award corresponding with Falcon's charges for Standby Time from April 20, 2021 to April 24, 2021 consistent with our opinion.

Hanni, J., concurs.

Dickey, J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that Appellants' first assigned error lacks merit and is overruled. The trial court's decisions entering default judgment are affirmed, and Appellants' second assigned error has merit in part. We reverse and vacate the damages award in part.

We hereby remand this matter to the trial court to issue a new judgment regarding damages and reduce the award in Falcon's favor. The court shall not include an award corresponding with Falcon's charges for Standby Time from April 20, 2021 to April 24, 2021 consistent with our opinion and according to law. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.